

# The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion

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## I. INTRODUCTION

The disproportionate incarceration of minorities is one of the American criminal justice system's most established problems. In spite of a societal backdrop in which descriptive claims of a "post-racial" America prosper, the problematic racial dynamics of criminal justice persist. The numbers are stark and clear: one out of every twenty-nine black adult women and men are currently incarcerated compared with only one out of every 194 whites.<sup>1</sup> But less clear are the causes of these disparities. For decades, scholars have struggled to understand why America prosecutes and incarcerates minorities at such massive rates. Perspectives on this troubling issue cover an incredibly wide range of themes, spanning from racist discussions of "biological differences" to thoughtful considerations of structural racism. A scientific revolution, however, has generated new interest with regard to how upstanding people—including judges, jurors, lawyers, and police—may discriminate without intending to do so. This implicit bias revolution has created new opportunities to empirically investigate how actors within the legal system can perpetuate discrimination in ways that have been—until now—almost impossible to detect.

The topic of implicit racial bias in the legal system is extraordinarily broad, and scholars are beginning to consider how it might illuminate inequality across a range of legal domains.<sup>2</sup> In the criminal law setting, in

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1. JENIFER WARREN, THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008 34 tbl.A-6 (2008), [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (aggregating numbers for all fifty states). For younger adults, the numbers are similarly startling. *See id.* One out of every nine black males between ages twenty and thirty-four are incarcerated. *Id.*

2. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., forthcoming 2012) (considering implicit racial bias across fourteen different legal domains).

particular, there has been noticeable progress. Recent empirical projects have begun the pursuit of assessing how implicit racial bias likely affects police, judicial, and juror decision-making.<sup>3</sup> But scholars have yet to conduct an in-depth examination of how implicit bias might affect one of the most noteworthy parts of the criminal justice system—prosecutorial discretion—and no empirical projects focused on implicit bias have gained access to prosecutors as study participants. The idea that prosecutors might be partially responsible for propagating inequality in the criminal justice system is far from new.<sup>4</sup> Until now, however, it has been difficult to explain in detail why prosecutors—the vast majority of whom would never intend to hold double-standards based on race—might nonetheless be unwitting propagators of bias.

From the arrest of a suspect to the sentencing of a defendant, consider the range of discretion-based decisions that prosecutors must make on a daily basis: Should an arrested citizen be charged with a crime? At what level should bail be recommended? Should bail be opposed? What crime or crimes will be charged? Should charges be dropped? Should a

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3. See Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006–09 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007) [hereinafter Levinson, *Forgotten Racial Equality*]; Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 187–89 (2010) [hereinafter Levinson et al., *Guilty by Implicit Racial Bias*]; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–96 (2009).

4. See Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2094–106 (2004) (considering the extreme deference given to prosecutors); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1599–600 (2004) (addressing “unconscious race empathy” that white prosecutors may have with white defendants or white victims); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1819 (1998) (alluding to unconscious biases produced due to similarities between prosecutors and victims); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 140–41 (2003) (proposing that it “[i]s likely that unconscious racism influences a prosecutor even more than it affects others”); Lucy Adams, Comment, *Death by Discretion: Who Decides Who Lives and Dies in the United States of America?*, 32 AM. J. CRIM. L. 381, 389–90 (2005) (“[A] white prosecutor may—consciously or subconsciously—perceive a crime to be more ‘outrageously or wantonly vile, horrible, or inhuman’ if it is alleged to have been committed against a white victim . . . .” (quoting GA. CODE ANN. § 17-10-30(b)(7) (1994) (footnote omitted))).

We do not claim that implicit racial bias accounts for all of the racial discrepancies in the criminal justice system. Structural racism, for example, may explain some of the disparity. In addition, for some types of crime, differences in offense rates also may help explain part of the variance. See *Homicide Trends in the U.S.*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/homicide/race.cfm> (last visited Feb. 3, 2012) (indicating that black Americans represent 52% of the known homicide offenders between 1976 and 2005). It should be noted, however, that both structural racism and implicit bias could account for some or even all of the disproportionality in arrest rates.

plea bargain be offered or negotiated? Which prosecuting attorney will prosecute which alleged crime? What will the trial strategy be? Will minority jurors be challenged for cause or with peremptory challenges? What sentence will be recommended?

This range of discretion offers a starting point with which to investigate how implicit bias might infect the prosecutorial process. Following a long line of scholarship examining the causes of racial disparities in the criminal justice system,<sup>5</sup> this Article argues that implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.

The Article is organized as follows: Part II provides an introduction to implicit bias research, orienting readers to the important aspects of implicit bias most relevant to prosecutorial discretion. Part III begins the examination of implicit bias in the daily decisions of prosecutors. The Part presents key prosecutorial discretion points and specifically connects each of them to implicit bias. Part IV recognizes that, despite compelling proof of implicit bias in a range of domains, there is no direct empirical proof of implicit bias in prosecutorial decision-making. It thus calls for an implicit bias research agenda designed to further examine how and when implicit bias affects prosecutorial decision-making, including studies designed to test ways of reducing the harms of these biases. It then begins a necessarily early look at potential remedies for the harms associated with implicit bias in prosecutorial discretion.

## II. IMPLICIT BIAS AND ITS RELEVANCE TO PROSECUTORIAL DISCRETION

Implicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways. Since the late 1990s, a vast amount of research on implicit bias has demonstrated that a majority of Americans, for example, harbor negative implicit attitudes toward blacks and other socially disadvantaged groups, associate women with family and men with the workplace, associate Asian-Americans with foreigners, and more.<sup>6</sup> Fur-

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5. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011); James Foreman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, N.Y.U. L. REV. (forthcoming 2012); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

6. See Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 447–48 (2005); Thierry Devos & Debbie S. Ma, *Is Kate Winslet More American Than Lucy Liu? The Impact of Construal Processes on the Implicit Ascription of a National Identity*, 47 BRIT. J. SOC. PSYCHOL. 191, 191–92 (2008); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs*

thermore, researchers have found repeatedly that people's implicit biases often defy their awareness and self-reported egalitarian values. In this Part, we begin by summarizing research on implicit racial bias generally,<sup>7</sup> and then provide specific examples of studies that facilitate our consideration of whether prosecutors may make decisions in biased ways. Because we believe that prosecutors' implicit biases manifest in a series of related decisions in which their perceptions of the defendants' dangerousness are paramount (ranging from the decision to charge to sentencing recommendations), we consider implicit bias studies that show that people automatically classify members of certain groups (particularly African-Americans) as dangerous, aggressive, and hostile. We also consider studies that show that when racial stereotypes such as these are active, people unintentionally make decisions in biased ways. These studies will set the stage for a step-by-step consideration of the points in time at which prosecutors might be unwittingly influenced by implicit bias.

*A. Priming: The Automatic Activation of Stereotype Networks*

"Priming" is a cognitive phenomenon that reveals how exposing people to photos, symbolic representations, or members of stereotyped groups activates a vast network of stereotypes about that group. Psychologists define priming as "the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context."<sup>8</sup> In the context of prosecutorial decision-making, priming might explain how, even with only minimal contact with an arrestee (such as seeing the arrestee's name, racial or ethnic classification, or photograph), racial stereotypes can be immediately and automatically activated in the mind of a prosecutor, without the prosecutor's awareness.

Racial and ethnic stereotypes can be primed easily. A study by Daniel Gilbert and Gregory Hixon demonstrated that simply seeing a person from a stereotyped group can activate stereotypes related to that

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from a Demonstration Website, 6 GROUP DYNAMICS 101, 101-02 (2002) (reporting results from 600,000 IATs on a popular online website). Much of this Part's description of implicit bias is based on Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition*, AKRON L. REV. (forthcoming 2012). Some of the descriptions of implicit bias, including study summaries and footnotes, are reproduced sometimes verbatim from that article.

7. Our goal is to provide a focused discussion of implicit racial bias as it relates to prosecutorial discretion. We therefore do not provide a full review of implicit bias scholarship. Other articles have provided broader reviews of implicit bias more generally. See generally IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 2; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007); Levinson, *Forgotten Racial Equality*, *supra* note 3.

8. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996).

group. Participants in the study were asked to complete a videotaped word fragment task presented by a research assistant holding cue cards.<sup>9</sup> Half of the participants watched a video featuring an Asian research assistant, and half watched a video featuring a Caucasian research assistant.<sup>10</sup> In each condition, the research assistant held the cards containing fragments that could be completed with either neutral words or with words stereotypic of Asians.<sup>11</sup> For each fragment, participants completed as many words as possible in fifteen seconds. The researchers found that simply seeing an Asian research assistant activated participants' ethnic stereotypes.<sup>12</sup> Participants who saw an Asian research assistant completed more stereotype-consistent words than participants who saw a Caucasian assistant.<sup>13</sup> This study shows how easily racial or ethnic stereotypes can be activated; simply seeing a person from a certain group can awaken harmful stereotypes.

Studies show that priming specifically activates the stereotype of the dangerous black male. Researchers Laurie Rudman and Matthew Lee, for example, primed participants by playing either pop music or rap music.<sup>14</sup> They hypothesized first that simply hearing rap music would activate participants' racial stereotypes, and second that these primed stereotypes would cause people to make more negative judgments about a black person.<sup>15</sup> The results of the study confirmed these predictions. Participants who listened to the rap music not only had their stereotypes activated but also rated a black person's behavior as less intelligent and more hostile than participants who listened to popular music.<sup>16</sup> It should be noted that asking participants about their own prejudices did not predict their judgments of the black person—a finding that supports the theory that stereotypes can affect decision-making even absent a person's endorsement or awareness.<sup>17</sup>

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9. Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 510 (1991). As Gilbert and Hixon point out, "Stereotypes are forms of information and, as such, are thought to be stored in memory in a dormant state until they are activated for use." *Id.* at 511.

10. *Id.* at 512.

11. For example, participants saw the fragments: "RI\_E," "POLI\_E," "S\_OR\_T," and "S\_Y." *Id.* at 510.

12. *Id.* at 513–14.

13. For example, they wrote: RICE, POLITE, SHORT, and SHY. *Id.*

14. Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 136–39 (2002). On average, participants listened to the music for thirteen minutes. *Id.* at 136. Participants were led to believe that they were participating in a marketing study. *Id.* at 135.

15. *Id.*

16. *Id.* at 139. This result was compared to participants who read about and rated a white person. *Id.* at 136.

17. *Id.* at 145.

Other researchers have shown how even subliminal priming techniques can activate a range of negative stereotypes about African-Americans. In one of the most well-known studies of subliminal priming and race, Patricia Devine showed participants rapidly flashing words, including stereotypes, that were associated with African-Americans, including “Blacks,” “Harlem,” “poor,” and “athletic.”<sup>18</sup> Participants then were asked to read a story about a person engaging in hostile behaviors that were designed to be somewhat ambiguous, such as demanding money back from a store clerk, and asked to make judgments about the person engaging in these behaviors. The results of the study confirmed the dangers of priming racial stereotypes. Participants who were primed with more of the African-American stereotyped words judged the actor’s ambiguous behavior as more hostile than participants who were primed with fewer of the stereotyped words. Devine concluded, “[T]he automatic activation of the racial stereotype affects the encoding and interpretation of ambiguously hostile behaviors for both high- and low-prejudice subjects.”<sup>19</sup>

Stereotypes can thus be activated by seeing a member of a stereotyped group, by hearing a certain type of music, or by being exposed to stereotype-consistent words. In the trial context, studies related to priming have found that even simply showing mock jurors a photograph of a dark-skinned suspect can activate harmful racial stereotypes and affect decision-making.<sup>20</sup> Justin Levinson and Danielle Young, for example, showed mock juror participants a series of photographs of a crime scene, including one security camera photo that showed a masked suspect robbing the store.<sup>21</sup> In the photo, the suspect, who was holding a gun, was dressed such that the only racially identifying information was the skin of his forearm. Half of the participants saw the photo showing the suspect with dark skin, and the other half of the participants saw a photo of the suspect with lighter skin. Despite the obvious legal irrelevance of the suspect’s skin color to the evidence, Levinson and Young found that the skin tone of the perpetrator in the photo affected the way participants

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18. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 9, 10 (1989).

19. *Id.* at 11.

20. See Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 310 (2010); see also Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How “Legal Priming” Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1059–62 (2005) (finding that simply informing study participants that they were jurors in a criminal trial caused them to make harsher behavioral and mental state attributions of out-group members).

21. Levinson & Young, *supra* note 20, at 337.

judged trial evidence and rated the defendant's guilt on a guilty/not-guilty scale.<sup>22</sup>

More specifically, mock jurors who saw the darker-skinned perpetrator found the same ambiguous evidence as more likely to indicate guilt, compared to mock jurors who saw the photo of the lighter-skinned perpetrator. Another study by Levinson found that simply changing the name and race of a suspect caused participants to remember case-relevant information in racially biased ways.<sup>23</sup> That is, participants who read about an African-American participant in a fight were more likely to remember that person's aggressive actions than those who read about a white fight participant. Furthermore, in some instances participants even "misremembered" certain facts—falsely recalling aggressive things the perpetrator had actually not done—in racially biased ways.<sup>24</sup> These studies show how simple situational cues, such as even brief exposure to racial information, can activate a vast network of racial stereotypes and affect decision-making in concerning ways. It would be expected, then, that when prosecutors work on cases involving members of stereotyped groups, stereotypes regarding these group members are automatically activated.

### B. The Implicit Association Test

In addition to the obvious relevance of research on priming to prosecutorial discretion, other research in the field of implicit social cognition helps illustrate how implicit biases might operate to affect prosecutors' decisions. The development of the Implicit Association Test (IAT), for example, revolutionized the way the world looked at and understood implicit bias.<sup>25</sup> Perhaps because its Web accessibility allows people to test (and attempt to overcome) their biases first hand, the IAT has served as a compelling and sometimes controversial symbol of implicit bias.<sup>26</sup> In the IAT,

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22. *Id.*

23. Levinson, *Forgotten Racial Equality*, *supra* note 3, at 350.

24. *Id.* at 400–01.

25. Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, in *THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER* 123 (Henry L. Roediger III et al. eds., 2001); Greenwald et al., *supra* note 6, at 1464.

26. Several legal scholars have debated the best uses of the IAT, focusing on such issues as the meaning of reaction times as well as the question of whether IAT scores can predict behavior, known as predictive validity. See Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479 (2007); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087, 1130–31 (2008); Lane et al., *supra* note 7, at 430; Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1028, 1032–33 (2006);

Participants sit at a computer and are asked to pair an attitude object (for example, black or white, man or woman, fat or thin) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts) by pressing a response key as quickly as they can. For instance, in one task, participants are told to quickly pair pictures of African American faces with positive words from the evaluative dimension. In a second task, participants are obliged to pair African American faces with negative words. The difference in the speed at which the participants can perform the two tasks is interpreted as the strength of the attitude (or, in the case of attributes, the strength of the stereotype). For example, if participants perform the first task faster than the second task, they are showing implicitly positive attitudes toward blacks. Similarly, if they are faster to perform tasks that oblige categorizing women with home than tasks that oblige categorizing women with career, they are showing implicit sex stereotyping.<sup>27</sup>

Nilanjana Dasgupta and Anthony Greenwald explain why the speed of association is important: “When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty.”<sup>28</sup> Laurie Rudman and Richard Ashmore similarly describe the IAT’s methodology as relying on “well-practiced associations between objects and attributes.”<sup>29</sup>

Researchers who employ the IAT have found that the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks, dark-skinned people, the elderly, and overweight people, among others.<sup>30</sup> For example, with regard to race, people consistently implicitly associate black with negative attitudes such as *bad* and *unpleasant*, and with negative stereotypes such as *aggressive* and *lazy*.<sup>31</sup>

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Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 737 (2009).

27. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 2, at 9, 16–17 [hereinafter Levinson et al., *Social Science Overview*].

28. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001).

29. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 359 (2007).

30. Nosek et al., *supra* note 6, at 101.

31. Rudman & Ashmore, *supra* note 29, at 361.



With regard to gender, for example, Americans tend to associate men with *career* and women with *home*.<sup>32</sup>

To legal scholars, the IAT has become a symbol of implicit bias.<sup>33</sup> There are two primary reasons for the compelling nature of the measure. First, research has shown consistently that people's implicit biases frequently diverge from their self-reported attitudes, a phenomenon known as dissociation.<sup>34</sup> Thus, people who view themselves as having favorable attitudes toward certain groups may be surprised to learn that this explicit favorability is not reflected in their own implicit cognitions. This fact would likely be relevant in the context of prosecutors, as we would predict that most prosecutors report their racial attitudes to be egalitarian.

Second, the IAT's popularity among scholars as a symbol of inequality may be traced to its success in predicting the way people make decisions. That is, the simple methodology of the IAT has shown how implicit bias leads to important real-world consequences, ranging from doctors' medical treatment decisions to human resource officers' decisions on whether to offer an interview to a job candidate.<sup>35</sup> In the case of prosecutors, we are primarily interested in whether prosecutors' implicit

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32. See Nosek et al., *supra* note 6, at 101; see also Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 1 (2010) (finding that law students display this particular implicit bias as well as an implicit association between men and judges, and women and paralegals).

33. Numerous scholars have discussed implicit racial bias and the IAT. See, e.g., Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 365–66 (2009) (suggesting that hate speech may lead to implicit bias); Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 658 (2007) (claiming that racial profiling relies on cognitive processes that harbor implicit biases); Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1445–54 (2008) (considering the relational aspects of implicit bias in the workplace); Jonathan Kahn, *Race, Genes, and Justice: A Call to Reform the Presentation of Forensic DNA Evidence in Criminal Trials*, 74 BROOK. L. REV. 325, 373 (2008) (discussing the results of IATs in the context of forensic DNA evidence); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 479 (2008) (discussing implicit bias in the context of sexual orientation bias); Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 41–46 (2009) (discussing implicit bias in the context of prisoners' rights); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 74–77 (2009) (predicting that implicit bias leads to housing discrimination against illegal immigrants); Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3, 19–34 (2009) (considering race- and gender-based implicit bias in politics and in the workplace); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 507 (2007) (noting that implicit bias may affect housing rentals more than employment decisions).

34. See Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meanings and Use*, 54 ANN. REV. PSYCHOL. 297, 303 (2003); Kang, *supra* note 7, at 1513; see also Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 133 (2004).

35. See Siri Carpenter, *Buried Prejudice*, SCI. AM. MIND, Apr./May 2008, at 32–33.

biases will lead to biased decision-making. Although no studies have yet tested whether implicit biases affect prosecutorial decisions, similar research in nonlegal professions has shown that implicit biases predict important decisions in concerning ways.

For example, medical researchers found that when asked to diagnose and treat a hypothetical patient (who was pictured as either black or white), emergency room doctors in Boston and Atlanta relied on their implicit racial biases.<sup>36</sup> Doctors who showed more bias in the black-white IATs were more likely to offer a preferred heart treatment to a white patient than a black patient.<sup>37</sup> Similarly striking research emerged in Sweden where Dan-Olof Rooth replied to hundreds of job postings by submitting resumes that differed only in the ethnicity revealed by the applicant's name.<sup>38</sup> Rooth measured which resumes elicited invitations to interview and subsequently tracked down the individual human resources officers responsible for making the interviewing decisions. Without knowing the true purpose of the study, the human resources officers completed an IAT. The researcher was able to measure the relationship between the officers' IAT scores and their previous decisions of whether to interview a candidate.<sup>39</sup> He found that the greater the human resources officers' implicit bias, the more likely those officers were to extend an interview to a non-Arab candidate. Other studies, including a meta-analysis of over 100 IATs, confirm that implicit bias on the IAT indeed predicts the way people make decisions in the real world.<sup>40</sup>

Few IATs have been conducted in the legal setting, but the ones that have tend to show that implicit racial biases are powerful and have broad effects.<sup>41</sup> A study by Levinson, Young, and Huajian Cai, for ex-

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36. Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1231 (2007).

37. *Id.* at 1235. Specifically, the doctors were asked to recommend a course of treatment for the patient and were then asked to complete three IATs testing their implicit racial biases. *Id.* at 1233. The study showed that doctors not only implicitly preferred white patients to black patients but also that their implicit racial biases predicted whether or not they would recommend thrombolysis (clot busting) treatment to a white or black patient suffering from myocardial infarction. *Id.* at 1234–35. The more the doctors implicitly preferred the white patients, the more likely they were to recommend thrombolysis treatment to white but not black patients. *Id.* at 1235. No similar predictive validity was found by asking doctors about their explicit racial preferences. *Id.* at 1233. On average, doctors self-reported no racial preferences at all. *Id.*

38. Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* (Inst. for the Study of Labor, University of Kalmar, Discussion Paper No. 2764), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=984432](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984432).

39. *Id.* at 9–11.

40. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 32 (2009).

41. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542 (2004) (finding implicit racial bias among capital defense attorneys); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblind-*

ample, tested implicit associations relating to the presumption of innocence and found that people hold implicit associations between *black* and *guilty*.<sup>42</sup> Using an IAT created specifically to examine the implicit connections of the presumption of innocence, as well as a traditional IAT measuring implicit racial attitudes, the researchers also showed that IAT scores predicted the way in which participants evaluated ambiguous trial evidence.<sup>43</sup>

Considered together, over a decade of research on implicit racial bias shows that racial stereotypes can be activated easily and can lead to powerful and biased decision-making. In the case of prosecutorial decision-making, there is significant reason to be concerned that implicit biases could similarly lead to discriminatory results. The next Part pursues this possibility by deconstructing prosecutorial decision-making and considering the various ways that implicit racial bias could challenge the integrity of the current prosecutorial system.

### III. IMPLICIT RACIAL BIAS CAN OPERATE IN EVERY PHASE OF PROSECUTORIAL DISCRETION

Prosecutors enjoy more unreviewable discretion than any other actor in the criminal justice system.<sup>44</sup> In this Part, we analyze this vast discretion by first isolating its various component parts and then exploring how implicit racial bias can operate in each phase of prosecutorial discretion.<sup>45</sup> We focus on three primary areas: (1) charging decisions, including both the decision of whether to charge and the decision of what crime to charge; (2) pretrial strategy, such as the decisions to oppose bail, offer a plea bargain, or disclose potentially exculpatory evidence to the defense; and (3) trial strategy, such as the decision to strike potential jurors or to analogize the defendant to an animal during closing arguments.

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ness, 7 J. EMPIRICAL LEGIS. STUD. 886 (2010) (finding that implicit stereotypes about the ethnicity of successful litigators predicted judgments of litigator performance); Rachlinski et al., *supra* note 3, at 1195–96 (finding that judges possess implicit biases favoring whites over blacks, and these biases sometimes predicted a judge's decisions).

42. Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 3, at 206.

43. *Id.*

44. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

45. For a discussion of the possible impact of implicit racial bias on other actors in the criminal justice system, see Charles Ogletree, Robert J. Smith & Johanna Wald, *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 2, at 45, 50–60.

### A. Charging Decisions

The first decision that a prosecutor makes in most criminal cases is whether to charge the suspect, and if so, with what charge.<sup>46</sup> In some cases the decision involves whether to charge the suspect at all. This power is an expression of mercy—holding back the legitimate power of the State. But as the United States Supreme Court noted in *McCleskey v. Kemp*, “[T]he power to be lenient [also] is the power to discriminate.”<sup>47</sup> Empirical studies confirm that the Court’s observation has played out; prosecutors are less likely to charge white suspects than black suspects.<sup>48</sup> These findings are true even when statistically controlled for prior criminal record.<sup>49</sup> Faced with such discrepancies in charging decisions, the question becomes: If two suspects with substantially similar backgrounds are arrested for identical crimes in the same jurisdiction, how can the suspect’s race possibly matter? One possibility is that implicit bias is at play.

#### 1. Charge or Release?

In order to understand the role that implicit racial bias might play in a decision of whether to charge a suspect with a crime, consider an ambiguous case of self-defense.<sup>50</sup> Imagine two homicide cases with identi-

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46. In federal cases, and in a minority of states, the prosecutor’s charging decision must be approved by a grand jury. This process, however, usually consists of little more than “rubber stamping” prosecutorial charging decisions. See Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, 78 MICH. L. REV. 463, 474 (1980) (indicating that grand juries rarely serve as a check against the charging decisions of prosecutors).

47. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (internal citation omitted); see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 35 (1998) (“A prosecutor may unconsciously consider a case involving a white victim as more serious than a case involving a black victim. This unconscious view may influence not only the charging decision, but related decisions as well.” (internal citations omitted)); Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 475 (2009) (“In the Jena Six case it can be argued that the prosecutor is capable of compassion in that he chose not to prosecute the white students who placed nooses on the schoolyard tree.”).

48. Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 647 (2012) [hereinafter *Task Force Report*] (“[E]ven after legally relevant factors . . . are taken into account,” racial differences affect how cases are processed: whites are less likely to have charges filed against them. (citing Robert D. Crutchfield, *Ethnicity, Labor Markets, and Crime*, in ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND SPACE (Darnell Hawkins ed., 1995))). Similarly, prosecutors have been shown to charge white and black defendants differently in homicide cases. See Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC’Y REV. 587, 587 (1985) (finding that the race of the defendant and victim mattered in charging decisions in Florida).

49. Radelet & Pierce, *supra* note 48, at 591.

50. This phenomenon is not limited to the self-defense context. For one particularly powerful example, consider the following story from a former United States Attorney:

cal facts except the race of the victim: one is black and the other is white. The suspect in each case claims self-defense, specifically alleging that he accidentally bumped into the deceased outside of a bar at night, at which point the deceased warned, “You better watch yourself, or you’re going to get yours.” The suspect contends that the deceased then reached toward his waist and began to pull out a shiny object. The suspect, thinking the deceased was reaching for a weapon, fired his own handgun in what turned out to be a fatal shot. No gun was located near the victim’s body, but police found a silver cell phone several feet from the deceased.

Prosecutors must assess the strength of a potential self-defense claim to determine whether they should bring charges at all, and if so, whether to offer a plea to manslaughter or another less serious charge. Assessing the strength of a possible self-defense claim requires an instinctual judgment: did the suspect reasonably believe that the deceased was reaching for a weapon? Recall our discussion of research indicating that Americans implicitly associate black citizens with aggression and hostility. Additional empirical research shows that people specifically associate blacks with guns and other weapons. For example, thousands of IATs taken online over the years have confirmed that the vast majority of Americans implicitly associate blacks with weapons and whites with harmless objects.<sup>51</sup> Other studies using priming methodology support this finding. Keith Payne, for example, found that when participants viewed rapidly flashing photos of black faces immediately before seeing photos of guns, they were significantly faster at identifying the guns than after being primed by white faces.<sup>52</sup> Applying this research to the scenario

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I had an [Assistant U.S. Attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, “Why do you want to drop the gun offense?” and he said, “He is a rural guy who grew up on a farm. The gun he had with him was a rifle. He is a good ol’ boy, and all the good ol’ boys have rifles, and it’s not like he was a gun-toting drug dealer.” But he [was] a gun-toting drug dealer, exactly.

JAMES E. JOHNSON ET AL., BRENNAN CTR. FOR JUSTICE, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010), [http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion\\_report.pdf?nocdn=1](http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion_report.pdf?nocdn=1).

51. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 55 (2007). We do not intend to suggest that implicit racial biases operate to the detriment of only black minorities. We focus on black Americans primarily, however, because research from the implicit bias literature is most robust in this area. We hope this work will be expanded to include a better understanding of the effects of implicit biases on all negatively stereotyped groups.

52. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). Similarly, when participants saw photos of white faces immediately before photos of tools, they were significantly faster at identifying the tools. *Id.* at 185. Interested in similar real-world applications of implicit bias and the association with weapons found by other researchers, Joshua Correll created a videogame-like study designed to test a phenomenon called, “Shooter Bias.” Joshua Correll et al.,

above, one could predict that a person perceived to be hostile and implicitly associated with weapons—a black person—would be perceived by prosecutors as likely reaching for a weapon.

The research, especially IAT findings that people implicitly dissociate whites and weapons, also suggests that prosecutors might be more likely to believe that the white victim was reaching for his cell phone, and thus, that the suspect acted unreasonably in shooting the deceased. So, switch the facts and assume that both victims are white. If suspect one is black, because Americans associate black citizens with hostility and aggression, then the prosecutor might be inclined to believe that the black suspect acted too quickly in shooting the unarmed man, while the same prosecutor might be inclined to believe that the white suspect—not only unencumbered by these negative associations but also bolstered by positive stereotypes such as lawful, trustworthy, and successful<sup>53</sup>—acted reasonably in discharging his weapon. Of course, these dynamics would be amplified in a cross-racial shooting because stereotypes affect the evaluation of both the suspect's and the victim's behavior. A white victim would be more likely to be perceived as reaching for a cell phone, and a black victim would be more likely to be perceived as reacting unreasonably in discharging his weapon.

Implicit racial bias might also affect prosecutorial discretion in the charging decision in a non-self-defense scenario. Consider a case in which the prosecutor must decide whether to charge a suspect with forcible rape. According to the suspect, after a romantic dinner and a movie, the complaining witness invited him back to her house. They entered her bedroom. The complaining witness grabbed his crotch area and started kissing him. He directed her onto the bed and began taking off her (and

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*The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314–15, 1322 (2002) [hereinafter Correll et al., *Police Officer's Dilemma*]. The “game” displays a series of photos of white and black suspects and pairs each individual suspect with either a gun or an innocuous object (such as a cell phone). *Id.* at 1315. Study participants play the game by looking at the suspects as they appear on the screen and then determining (as fast as possible), based upon whether the suspects are holding a gun or not, whether or not to shoot. *Id.* They are instructed to shoot armed suspects as fast as possible, and not shoot (by hitting a safety button) unarmed suspects as fast as possible. *Id.* at 1315–16. Similar to the IAT, the researcher in this study measures the participants' reaction time in milliseconds as well as the number of errors they make in shooting or not shooting suspects. *Id.* at 1317. The results of the study consistently show that the vast majority of participants shoot armed black suspects faster than armed white suspects, and even more concerning, make errors in a systematic way by shooting more unarmed black suspects than unarmed white suspects. *Id.* at 1318; see also Joshua Correll et al., *Event-Related Potentials and The Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 120, 122 (2006) (finding that shooter bias is related to the activation of fear in participants' brains).

53. These are words that are often used in a black–white stereotype IAT. See Rudman & Ashmore, *supra* note 29, at 361.

then his) clothes and began having intercourse. After roughly one minute, she slapped his face. Taking this as a sign of sexual play, he slapped her back. After roughly another minute, he saw tears rolling down her face, immediately stopped having intercourse and asked her, “What’s wrong?”

The witness tells a different story. She contends that the suspect closed the door after they entered the bedroom. He approached her quickly as though he was going to shove her against the door. She put up her hand in a defensive posture and struck him in the crotch area. He began kissing her. At first she tried to pull away, but then she “just sort of stopped resisting.” He shoved her onto the bed and began taking off her (and then his) clothes. She said it “all happened so quickly” that she didn’t know what was happening and felt like she was in “shock.” She slapped his face as hard as she could muster. He then slapped her across the face with such force that she thought “my jaw had shattered.” She began to sob. After a pause, he asked her, “What is wrong?” and then rolled off from on top of her. She began to sob very loudly. How does the prosecutor evaluate whether to charge this crime as a rape or consider the conduct to represent a reasonable mistake?

As prosecutors process the contested facts of the case, they cannot help but consider both the rape suspect and the complaining witness. Regarding the race of the suspect, research confirms that people associate the crime of rape with black perpetrators. A study by Jeanine Skorinko and Barbara Spellman found that when asked to identify societal conceptions of criminals for certain crimes, participants overwhelmingly selected black perpetrators as being associated with the crime of rape.<sup>54</sup> After reading the competing statements of the suspect and the complaining witness, and seeing the mug shot of the suspect, a black male, prosecutors might implicitly associate *black male* with sexual aggression and insatiability, and even, as the research suggests, specifically with the crime of rape.<sup>55</sup> It is not that the prosecutors consciously think about the black suspect and purposefully decide that black males are rapists. Rather, the associations are automatic; the prosecutors might “sense” aggression in the interaction or might have an instinctual reaction that the suspect is an incorrigible offender, but those thoughts are not necessarily

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54. Jeanine L. Skorinko & Barbara A. Spellman, Speech at the 1st Annual Conference on Empirical Legal Studies: Stereotypic Crimes: How Group-Crime Associations Affect Memory and (Sometimes) Verdicts and Sentencing 19 (Oct. 27, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=917761](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917761).

55. See Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 251 (2007) (“Research shows black males have been characterized traditionally as hypersexual, ‘lascivious, sexual monsters who preyed upon white women.’” (citation omitted)).

consciously linked to race. And, again, it matters who the complaining witness is too. White women historically have been portrayed as pure and sexually modest. Black women, by contrast, are stereotyped as promiscuous and seductive.<sup>56</sup> If the complainant in a rape case is a black woman, the prosecutor might implicitly associate the victim with such stereotypes and unintentionally devalue the accusation.

## 2. Determining What Crime to Charge

In other cases, the question is what crime to charge. The American Bar Association's Standards for the Prosecutorial Function lists the following factors among those for the prosecutor to consider in making the charging decision: What motives did the accused possess? Is the offense proportionate to the potential punishment? What is "the extent of the harm caused by the offense"?<sup>57</sup> Each of these guideposts requires highly subjective decision-making. Evidentiary assessments in these contexts are not as simple as determining whether a gun was fired. Consider a scenario in which a prosecutor must choose between charging a suspect with simple drug possession or possession with intent to distribute. Imagine two suspects are arrested, both possessing the same quantity of drugs—one suspect is black, one is white. Stereotypes related to drug using versus drug dealing become relevant, and any implicit associations that prosecutors might have regarding race and the particular crimes can affect the charge rendered. If we assume that prosecutors hold similar stereotypes as the rest of us (and there is little reason to believe otherwise)<sup>58</sup> then it becomes clear how when a prosecutor sees a young black male with drugs, the association between young black male and drug dealer<sup>59</sup> can affect the evaluation of whether this particular person intended to sell the drugs or to consume them for personal use.<sup>60</sup>

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56. *Id.* ("[B]lack female rape victims are either ignored by the media altogether or portrayed as 'loose, promiscuous, oversexed, whorish women.'" (citation omitted)).

57. A.B.A. CRIMINAL JUSTICE SECTION STANDARDS: PROSECUTION FUNCTION §§ 3-3.9(b)(iv), (iii), (ii) (1992), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html).

58. See, e.g., JOHNSON ET AL., *supra* note 50; Levinson et al., *Social Science Overview*, *supra* note 27, at 9–12.

59. Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 446 (2005) (noting that the stereotypical representation of a dangerous drug dealer overlaps with the stereotypical characteristics of black Americans).

60. Supporting this argument, there is evidence of significant gaps between actual drug dealing rates and the arrest rates from drug dealing. See Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 121 (2008) (examining statistics from Seattle, Washington, and finding that although the majority of drug dealers were found to be white, 64% of drug dealing arrestees were black).



Another charging decision that illustrates how implicit racial bias might infect prosecutorial decision-making involves the decision to charge juvenile suspects (those under the age of eighteen) in adult court as opposed to juvenile court. The differences between juvenile and adult proceedings are drastic. Although the goal of adult court is to punish the offender, the goal of juvenile court centers on the well-being of the juvenile delinquent.<sup>61</sup> Moreover, while in most jurisdictions a juvenile charged with a serious offense in juvenile court faces detention until his twenty-first birthday (or five years after the commission of the crime, whichever is longer),<sup>62</sup> the same juvenile charged in adult court could face decades of (or, in the most serious cases, life) imprisonment.

Several criteria guide the decision to transfer a juvenile into adult court, including: “The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living”;<sup>63</sup> “[t]he seriousness of the alleged offense”;<sup>64</sup> “[w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner”;<sup>65</sup> and “[t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile.”<sup>66</sup> In order to get a sense of the various ways in which implicit racial bias can operate in the decision to transfer a juvenile to adult court, once again consider the stereotype that black Americans are more aggressive and hostile than their white counterparts. When prosecutors assess “the seriousness of the alleged offense” or whether the offense was committed in an “aggressive or violent” manner, they assess the facts not in a vacuum but in relation to the offender. Similarly, when prosecutors evaluate the juvenile’s “home, environmental situation, emotional attitude and pattern of living,” stereotypes of Latino families living in crowded and squalid conditions may affect the prosecutors’ judgments. Thus, given the broad discretion of prosecutors and the close connection between the legal standards and racial and ethnic stereotypes, it is likely that two identical charges can end up in different courts (juvenile versus adult) despite substantially similar facts.

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61. Administrative Office of the Courts of Georgia, *Juvenile Courts*, GEORGIACOURTS.GOV, [http://www.georgiacourts.gov/index.php?option=com\\_content&view=article&id=169&Itemid=0](http://www.georgiacourts.gov/index.php?option=com_content&view=article&id=169&Itemid=0) (last visited Feb. 6, 2012) (“The purpose of our Juvenile Courts is to protect the well-being of children, provide guidance and control conducive to child welfare and the best interests of the state, and secure care for children removed from their homes.”).

62. *Id.*

63. *Kent v. United States*, 383 U.S. 541 app. at 566–67 (1966) (listing factors to be considered in deciding whether to transfer a case to adult court).

64. *Id.* app. at 566.

65. *Id.* app. at 567.

66. *Id.*

Imagine a sixteen-year-old youth who steals a candy bar from a convenience store, the store clerk struggles to restrain the juvenile before he exits the store, and the juvenile punches the clerk in the face, rendering him unconscious. Did the juvenile strike the store clerk because it was the only way he could get free and avoid apprehension? Did the juvenile just panic? Or is the juvenile the type of person who will react violently at the drop of a dime? If the juvenile is black, the prosecutor assessing the facts of this case might be primed by the picture of the juvenile, the notation that he is black, or even the recognition of a stereotypically black name that triggers associations between the black juvenile and the concepts of aggression and hostility.<sup>67</sup> The activation of these negative constructs can translate into a sense that the crime (or the offender) is more aggressive or violent than would be the case if the prosecutor assessed the facts of the case in a truly race-neutral manner. This implicitly biased evaluation process has been documented in juvenile probation officers and police officer participants. Sandra Graham and Brian Lowery, for example, found that when these participants were subliminally primed with words related to the category black, they judged an adolescent's behavior as more dispositional, of greater culpability, and more likely to lead to recidivism.<sup>68</sup>

Consistent with these startling results, research from the field suggests that decision-makers in fact possess the perception that misbehavior by black youth is more dispositional than misbehavior by white youth. Analyzing official court assessments of juvenile offenders, George Bridges and Sara Steen found that officials "consistently portray black youths differently than white youths in their written court reports, more frequently attributing blacks' delinquency to negative attitudinal and personality traits."<sup>69</sup> Just as in Graham and Lowery's study, the researchers found that perceived "negative internal attributes" that the black children possessed outweighed even characteristics such as the seriousness of the offense and prior criminality.<sup>70</sup>

The operation of implicit racial bias on the charging decisions of prosecutors can even mean the difference between life and death. For

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67. In addition to the stereotypes that apply to black citizens, and especially black males, there is some evidence of powerful stereotypes that apply uniquely to black youth. See, e.g., Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 LAW & INEQUALITY 1, 39 (2009) (referencing "the stereotype of the 'big Black kid' as bestial, uncontrollable, and aggressive" (citation omitted)).

68. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 483 (2004).

69. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567 (1998).

70. *Id.*

offenses eligible for capital punishment, the decision to prosecute also includes whether to seek the death penalty. If prosecutors decide to prosecute for capital punishment, they need to choose which aggravating factor(s) (those elements which elevate ordinary first-degree murder to a murder that is eligible for a possible death sentence) to allege.<sup>71</sup> For example, prosecutors could assert that this particular murderer deserved the death penalty relative to the average murderer because he is a “future danger” to society.<sup>72</sup> All murderers have, by definition, purposefully taken a human life. But how do prosecutors decide which murderers are among the most likely murderers to represent a future danger to society? The decision requires prosecutors to make a highly subjective predictive determination and thus a determination prone to bias. When prosecutors evaluate the capitally accused suspect, whom do they see? As we have explained, the mere activation of a racial stereotype has been shown to lead to harsher attributions of criminal disposition and hostility, even in ambiguous situations. In the case of a black defendant, particularly one who possesses more Afrocentric features, these same negative stereotypes of a hostile black defendant could, in turn, influence whether the prosecutor views the defendant as a future danger.<sup>73</sup>

Thus, whether the charging decision involves the prosecution of a forcible rape case, the decision to charge a drug crime as either simple possession or possession with the intent to distribute, or even whether to seek the death penalty against a particular defendant, the discretion enclosed in each of these moments of prosecutorial decision-making permits the operation of implicit racial bias in the criminal justice system.

### B. Pretrial Strategy

#### 1. Bail Determinations

Once a charging decision has been made, prosecutors must determine whether to oppose bail and, if not, how high of a bail to recom-

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71. For a fuller exploration of this phenomenon, see Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 2, at 229, 231–43.

72. See, e.g., *Buck v. Thaler*, 132 S. Ct. 32, 35–36 (2011) (Sotomayor, J., dissenting from denial of certiorari) (“[T]he [Texas] prosecutor [in a capital murder case] said: ‘you have determined that . . . the race factor, black, increases the future dangerousness [of the defendant] . . . [The expert] answered, ‘yes.’”).

73. Indeed, research shows that there is a relationship between death sentences and the stereotypically black appearance of defendants. See Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383, 385 (2006). Other research confirms the effect of stereotypically black appearances in criminal decision-making. See Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 *PSYCHOL. SCI.* 674, 674 (2004).

mend. There is empirical evidence to suggest that, at least in some jurisdictions, minority defendants receive less favorable pretrial detention determinations than their white counterparts.<sup>74</sup> Similar to a prosecutor's decision to charge, this finding might be partially driven by implicit racial attitudes and stereotypes. In the bail context, in addition to the stereotype of the black defendant as hostile and prone to criminality,<sup>75</sup> which itself could lead to inflated bail requests, implicit racial bias might also operate through a functionally distinct mechanism—namely, the implicit devaluation of the defendant. One major factor in all bail determinations is the strength of the defendant's ties to the community, including employment situation. Here, the assumption is that if a defendant has a good job and a solid connection with the community, then the defendant will be less likely to flee.

As studies such as stereotype IATs repeatedly demonstrate, black Americans are stereotyped as being less intelligent, lazier, and less trustworthy than white Americans.<sup>76</sup> If a prosecutor is primed with a picture of the black defendant as she reviews the case file prior to the bail hearing, these negative work- and character-related stereotypes might cause the prosecutor to view the black defendant's work history and community connection with more skepticism than a similar background provided by a white defendant's background.<sup>77</sup> On the other hand, a white prosecutor might view a similarly situated white defendant with positive implicit attitudes and stereotypes activated. These stereotypes might lead to the judgment that a hard-working and intelligent white defendant has a

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74. *Task Force Report*, *supra* note 48, at 628 ("Disparate treatment has been discovered in the context of pretrial release decisions, which systematically disfavor minority defendants."); *see also* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 987 (1994) (finding that black and male Hispanic defendants in New Haven, Connecticut appeared to be given bail at unjustifiably high amounts).

75. The pretrial bail context is analogous in many respects to posttrial sentencing, a topic that we do not discuss in depth in this Article. After a jury convicts the defendant, the prosecutor must decide what sentence to recommend to the trial judge. *See Task Force Report*, *supra* note 48, at 647. Here, too, there is evidence to suggest racially disparate outcomes. *Id.* In Washington State, for example, black defendants in felony drug cases are roughly two-thirds more likely than comparable white defendants to receive a prison sentence. *Id.* at 648. The role of implicit racial bias on the operation of prosecutorial discretion might inform these disparities too. Studies suggest that prosecutors recommend harsher sentences for black defendants. *Id.* at 647. The implicit connection between black citizens and hostility, dangerousness, and criminality can operate in the sentencing recommendation context just as it operates to influence the amount of bail the prosecutor recommends for a suspect pretrial. *See id.* at 650.

76. *See, e.g.*, Rudman & Ashmore, *supra* note 29, at 361.

77. Of course, in some circumstances, this employment-related stereotype, as well as others, might reflect reality. For example, there is evidence that black Americans are disproportionately poor and have lower employment rates. There is, however, evidence that implicit bias can lead to such results. *See, e.g.*, Rooth, *supra* note 38.

strong employment background and an intimate connection with the community.

## 2. Disclosure of Exculpatory Evidence

The Due Process Clause of the Fourteenth Amendment requires prosecutors to disclose to the defense any exculpatory information they uncover.<sup>78</sup> But the evidence does not always make its way into the defense counsel's hands. Sometimes this is because prosecutors willfully refuse to turn over the evidence despite its exculpatory nature. Take the case of *Connick v. Thompson*.<sup>79</sup> John Thompson spent eighteen years in the Louisiana State Penitentiary—most of them on death row—before his release in 2003.<sup>80</sup> At his capital murder trial, Thompson opted not to testify in his own defense because he was previously convicted of armed robbery.<sup>81</sup> The proof of his innocence of the armed robbery languished in the files of the New Orleans Crime Laboratory.<sup>82</sup> One month before his scheduled execution, a defense investigator stumbled upon a lab report indicating that the blood evidence the prosecution presented at trial did not match Thompson's blood type.<sup>83</sup> One assistant district attorney “intentionally suppressed [the] blood evidence,” and then, shortly after being diagnosed with terminal cancer, confessed his wrongdoing to another assistant district attorney who did not reveal the secret until five years later.<sup>84</sup> The Louisiana Supreme Court vacated both convictions.<sup>85</sup> Upon his release, the Jefferson Parish District Attorney retried Thompson for capital murder. A jury acquitted him.

Why would prosecutors choose to not turn over exculpatory evidence? One possibility is that they are convinced that the defendant committed the crime despite the potentially exculpatory evidence, and they believe that the evidence would unduly harm the chance to convict a dangerous offender. Under this theory, whether to disclose potentially

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78. *United States v. Agurs*, 427 U.S. 97, 107 (1976) (holding that prosecutors must turn over to the defense evidence “clearly supportive of a claim of innocence” regardless of whether the defense requests the evidence); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

79. *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011). This description of the *Connick* case first appeared in Robert J. Smith, *Recalibrating Constitutional Innocence Protections*, WASH. L. REV. (forthcoming 2012).

80. *Connick*, 131 S. Ct. at 1355.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1356 n.1.

85. *Id.* at 1355.

exculpatory evidence turns, in part, on the seriousness of the charges and the perceived strength of the defense case as discounted for revelation of the piece of evidence to the defense. Perceptions of the seriousness of the crime, in turn, depend in significant part on the how the prosecutor views the defendant. If the defendant is implicitly associated with hostility, criminality, or dangerousness, then implicit racial bias can influence the decision to disclose (or not) the ambiguous evidence by altering the perception of the defendant, which, in turn, alters the perception of the seriousness of the crime. Thus, prosecutors' decisions to comply with their *Brady* obligations also can be infected by implicit racial bias.

### 3. Plea-Bargaining

Most criminal cases are resolved by plea bargain, where the defendant admits guilt in exchange for a reduced charge (or a lesser sentencing recommendation). Unlike the disclosure of exculpatory evidence, plea-bargaining is subject to almost zero oversight. We have argued that, in several contexts, implicit racial bias thrives in the midst of discretionary determinations. Plea-bargaining is no exception. Consider a sampling of four "factors" among those the Department of Justice instructs federal prosecutors to consult in deciding whether to pursue a bargained disposition: (1) "[T]he nature and seriousness of the offense or offenses charged"; (2) "the defendant's remorse or contrition and his willingness to assume responsibility"; (3) "the public interest in having the case tried rather than disposed of by a guilty plea"; and (4) "the expense of trial and appeal."<sup>86</sup> How might the defendant's (or the victim's) race have an impact on the prosecutor's decision whether to offer a plea bargain, and if a plea is in fact offered, how much of a charging reduction will be offered in exchange for the guilty plea?

First, consider prosecutors' assessment of the "seriousness of the offense charged." Imagine a domestic violence case where a man severely abuses his spouse. Does it matter if the spouse is black?<sup>87</sup> Imagine white prosecutors deciding whether to offer the suspect a plea deal on a misdemeanor battery charge. As the prosecutors attempt to quantify the seriousness of the offense, they might not be able to empathize with the fear and pain of a black woman as much as they could empathize with a white woman subjected to domestic abuse. This phenomenon is known as "in-group favoritism," which is defined as "our tendency to favor the

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86. U.S. DEP'T OF JUSTICE, GRAND JURY MANUAL: PLEA AGREEMENTS IX-7 to -8 (1991), available at <http://www.justice.gov/atr/public/guidelines/207144.pdf> (excerpted from Principles of Federal Prosecutions).

87. Similarly, does it matter if his spouse is a man?

groups we belong to.”<sup>88</sup> Justice Scalia might use the term in-group favoritism to label the “undeniable reality” he described in his dissent in *Powers v. Ohio* “that all groups tend to have particular sympathies . . . toward their own group members.”<sup>89</sup>

There is experimental support for the existence and power of in-group favoritism, or bias, as it relates to empathizing with a victim. Alessio Avenanti used a method called transcranial magnetic stimulation (TMS) to measure corticospinal activity level in participants who viewed short video clips of a needle entering into the hand of either a light-skinned or dark-skinned person.<sup>90</sup> Consistent with the in-group empathetic-bias explanation, Avenanti found that region-specific brain activity levels were higher when Caucasian-Italian participants viewed the clip of a light-skinned participant experiencing pain than when they saw a clip of a dark-skinned target being subjected to pain.<sup>91</sup> Returning to the white prosecutors trying to assess the seriousness of the domestic abuse suffered by a black woman, prosecutors might undervalue the extent of the harm caused by the abuse relative to the harm that they would consider a similarly situated white woman—perhaps someone who reminds them of their mothers, sisters, or daughters—to have suffered.

The defendant’s race (as well as the victim’s race) can also influence the plea-bargaining process. Imagine a prosecutor trying to determine whether to offer a defendant a plea to manslaughter (and thus a term of years) or to proceed to trial to try to obtain a second-degree murder conviction (and thus, in many jurisdictions, life without parole). Whether “the public interest” is satisfied by a plea bargain (as opposed to going to trial where the defendant could receive a harsher sentence) and whether “the expense of trial” is worth it turn on how the prosecutor views the defendant. Is this person dangerous and thus likely to commit a future crime? As a white prosecutor reviews the case file of a young white defendant, the prosecutor might be unknowingly affected by positive implicit stereotypes relating to lawfulness and trustworthiness. This could lead to a more lenient evaluation of the defendant—troubled, but

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88. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010).

89. *Powers v. Ohio*, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting).

90. Alessio Avenanti, *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1020–21 (2010). Interestingly, both groups showed activity levels indicating empathy when viewing needles entering unfamiliar purple hands. *Id.* The researchers interpret this result as indicating that empathy was not simply inhibited by unfamiliarity but also by racial bias and stereotypes. *Id.*

91. Similarly, African-Italian participants showed more empathy-consistent brain activity levels when viewing a dark-skinned person experiencing pain than when viewing a light-skinned person experiencing pain. *Id.* Results also showed that participants’ empathic response was predicted by their implicit racial biases. *Id.*

not a bad person, for example—and thus a plea offer is more likely to follow. As we have well-covered by now, the opposite will be true when the prosecutor views a black defendant; the prosecutor's mind will likely trigger automatic associations between the defendant and the concepts of violence and hostility. On a related point, as the prosecutor attempts to determine the degree of remorse the defendant has displayed (for example, during plea negotiations), the stereotype that black citizens are less fully human might render the prosecutor less able to detect remorse from a defendant's body language or more likely to reject a black defendant's apology as self-serving or otherwise not genuine.<sup>92</sup> So too might the stereotypes that black citizens are violent, hostile, and prone to criminality have an impact on the degree of remorse that the prosecutor is able to detect in a defendant.

### C. Trial Strategy

#### 1. Jury Selection

Lawyers selecting a jury in a criminal case are allocated a predefined number of peremptory challenges, which they can use to eliminate prospective jurors without justification. Under the Due Process Clause of the Fourteenth Amendment, these strikes cannot be used to eliminate jurors based on their race.<sup>93</sup> The prohibition against race-based strikes is clear, but policing the rule is far murkier. Courts routinely uphold peremptory challenges based on largely unverifiable race-neutral explanations, for example, those based on avoiding eye contact, possessing an apparent lack of intelligence, or showing signs of nervousness. Indeed, it is so difficult to detect conscious evasion of the prohibition against racially motivated strikes that Justice Powell noted in *Batson*, “[P]eremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”<sup>94</sup>

Striking black jurors used to be based on explicit racism. For instance, in *Miller-el v. Cockrell*, the U.S. Supreme Court discussed a trial manual (titled *Jury Selection in a Criminal Case*) used in the Dallas County District Attorney's Office in the 1960s and 70s.<sup>95</sup> Among the advice offered by the manual to trial prosecutors: “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no

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92. See Philip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304–05 (2008).

93. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

94. *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

95. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003).



matter how rich or how well educated.”<sup>96</sup> Even in the twenty-first century, prosecutors struggled to mask racially motivated strikes. For example, in one Louisiana capital case, the prosecutor explained that he struck one black juror because he was “the only single black male on the panel with no children.”<sup>97</sup> There is less reason to believe that the vast majority of prosecutors today strive to strike jurors on the basis of race. This does not mean that race-based strikes are not a problem. Indeed, Justice Breyer recently noted that “[he] was not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem.”<sup>98</sup>

Implicit racial bias might help to explain why egalitarian-minded prosecutors nonetheless disproportionately strike black jurors.<sup>99</sup> In addition to the stereotype that black citizens are prone to criminality (and thus might sympathize more with those who commit crime), prosecutors might associate black citizens with lack of respect for law enforcement and opposition to the prosecution of drug crimes or use of the death penalty as a punishment.<sup>100</sup> If a prosecutor questions a prospective black juror, the simple act of even talking to that person might activate any of these negative stereotypes as well as more general negative implicit attitudes, causing the prosecutor to think or feel negative thoughts about the juror. The prosecutor might project this negativity through body language and gestures, which could, in turn, cause jurors to avoid eye contact, provide awkward or forced answers that make the juror appear less intelligent, or simply fidget and look nervous. Thus, even accurate race-neutral behavior descriptions might stem from racialized assessments (albeit, without conscious thought) of the characteristics of individual jurors.

## 2. Closing Arguments

Implicit racial bias can also have an impact on the content of a prosecutor’s closing argument and, in turn, on the manner in which the jury (or judge) views the evidence in the case. In *Darden v. Wainwright*, the prosecution referred to the defendant during closing arguments as an “animal”<sup>101</sup> that “shouldn’t be out of his cell unless he has a leash on him

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96. *Id.* (citation omitted).

97. *State v. Harris*, 820 So. 2d 471, 474 (La. 2002).

98. *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring).

99. Antony Page has elegantly made this argument. See Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

100. Of course (and, in some cases, for good reason) these last two stereotypes, which likely derive from a more general mistrust in the criminal justice system, might be accurate.

101. *Darden v. Wainwright*, 477 U.S. 168, 180 n.11 (1986).

and a prison guard at the other end of that leash.”<sup>102</sup> “In a recent Louisiana case, the prosecution referred to the black . . . defendant as ‘[a]nimals like that (indicating)’ and implored the jury to ‘be a voice for the people of this Parish’ and to ‘send a message to that jungle.’”<sup>103</sup> The use of animal imagery in reference to the accused can both depend on and perpetuate the negative effects of implicit race bias.

Referring to the accused in nonhuman terms dehumanizes the defendant in the eyes of the jurors and could potentially lead to harsher punishment. In a compelling empirical study that showed how people continue to mentally link blacks with apes, Philip Goff and colleagues asked participants to view a degraded image of an ape that came into focus over a number of frames.<sup>104</sup> When primed with a consciously undetectable image of a black face, participants were able to identify the ape in fewer frames; conversely, when primed with a consciously undetectable white face, participants required more frames to detect the ape than when they received no prime at all.<sup>105</sup> The study confirmed that people, most of who claimed not to have even heard of the stereotype linking blacks to apes, nonetheless implicitly associated blacks with apes, a finding that heightens the concern surrounding the use of animal imagery during prosecution.

In a related study that linked the animal-imagery study to criminal sentencing, Goff next explored the black–ape association by comparing the frequency of animalistic references to black defendants with that of similar references to white defendants in a dataset of 600 criminal cases prosecuted in Philadelphia between 1979 and 1999.<sup>106</sup> The study found that coverage from the *Inquirer*, Philadelphia’s major daily newspaper, of black defendants included, on average, nearly four times the number of dehumanizing references per article than articles covering white capital defendants.<sup>107</sup> Furthermore, the study found a strong correlation between the number of times an animalistic reference was made and the likelihood that the defendant received the most severe punishment available.<sup>108</sup>

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102. *Id.* at 180 n.12.

103. Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 403–04 (2012) (citing *State v. Harris*, 820 So. 2d 471 (La. 2002) (transcripts containing the prosecutor’s references are on file with the Louisiana Supreme Court and the authors)).

104. See Goff et al., *supra* note 92, at 303–05.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

*D. Beyond the Trial: More Prosecutorial Discretion*

This Part has provided a step-by-step account of the potential impact that implicit racial bias can have on prosecutorial discretion. We have focused narrowly on case-specific decisions ranging from the decision to charge a suspect to how the prosecutor maneuvers through the pretrial process to the decisions the prosecutor makes at the trial. This discussion remains incomplete, however. The idea that easily activated stereotypes of certain defendants can influence the decision-making process applies with equal force to other forms of prosecutorial discretion. For example, prosecutors must decide whether to join defense lawyers in urging for a conviction to be vacated in a case of actual innocence. Is a prosecutor convinced by a lower quantum of evidence in a case involving a white prisoner (who might or might not be a violent offender) than in a case involving a black or Latino prisoner? Perhaps the question is whether to recommend a defendant to drug counseling or to press instead for jail time—do implicit stereotypes of black citizens have an impact on the prosecutor's assessment of the suitability of alternative sentencing?<sup>109</sup>

Or consider office-wide decisions, such as on which crimes to concentrate prosecution efforts given limited resources.<sup>110</sup> Is the decision to target street gangs—one recently made a top priority by the Department of Justice—influenced by the perceived explosion of Latino gangs and the conception of Latinos as drug dealers and “illegal aliens,” or is the decision based solely on the seriousness of the crime involved? Again, before we can answer that the seriousness of the crime drives the policy choice, are we able to gauge the seriousness of the crime without being influenced by our conception of the offenders? Indeed, the race of the defendant might infiltrate the prosecutor's core beliefs about the justifications of punishment—do black defendants tend to activate the concep-

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109. There is also emerging research suggesting that black citizens are viewed as possessing more static personality traits and thus as being less capable of change. This research would also be quite relevant to a prosecutor's decision whether to recommend counseling or jail time for a black offender. See Jennifer Eberhardt, *The Ape and the Static Being: Two Views of Blacks in the Modern Era*, Panel at the Michigan State Law Review Symposium: Moving Beyond “Racial Blindsight”? The Influence of Social Science Evidence After the North Carolina Racial Justice Act (Apr. 8, 2011), available at <http://www.law.msu.edu/blindsight/media.html>.

110. See Davis, *supra* note 47, at 36.

[I]f a prosecutor deems a particular case to be more serious than others, she will tend to invest more time and resources in that case, both investigating and preparing for trial. Such an increased investment would consequently yield more evidence and stiffen prosecutorial resolve. The likelihood of conviction is also obviously increased by the additional investment in investigation. Thus, although the strength of the evidence and the likelihood of conviction are facially race-neutral factors, they may be influenced by an unconsciously racist valuation of a case involving a white victim.

*Id.*

tion that offenders deserve to be punished<sup>111</sup> whereas white defendants tend to activate other justifications for punishment, such as deterrence or rehabilitation?

We hope that we have conveyed a sense that the potential impact of implicit racial bias on prosecutorial discretion is broad and deep. In the remainder of this Article, we explore the ways in which we might build a body of proof to support our contention that implicit racial bias infects the decisions of prosecutors, and finally, we consider possible remedies for avoiding or minimizing the damage associated with the operation of such bias.

#### IV. ADDRESSING THE EFFECTS OF IMPLICIT RACIAL BIAS ON PROSECUTORIAL DISCRETION

As we have demonstrated, there are compelling reasons to believe that prosecutors unwittingly display implicit racial bias at a variety of decision points. One could expect that in the aggregate, the harms of these biases are quite substantial. It is important to note, however, that empirical studies have yet to test prosecutors directly or prove that prosecutors act automatically in bias-influenced ways. We therefore encourage researchers to take on the charge of pursuing our hypotheses empirically. Although we expect to pursue some of these hypotheses ourselves, the best science is collaborative, transparent, and forward-looking. We thus specifically encourage researchers to test precisely where and how implicit bias operates in the context of prosecutorial decision-making and provide here several examples of potential starting points.

For instance, testing our hypothesis regarding prosecutors' decisions whether or not to charge, researchers might examine whether participants subliminally primed with black and white faces make different decisions when deciding how to charge suspects (versus opting not to prosecute) in borderline cases. A similar research methodology could be used to test our hypothesis regarding implicit bias and plea-bargaining. One could, for example, measure whether participants primed with a black face are less likely (than those primed with a white face) to recommend a plea deal to a lesser charge in the context of a particular crime, such as forcible rape, which plays into black stereotypes of sexual aggression. Using a different methodology relating to our hypothesis regarding the use of animal imagery in closing arguments, researchers

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111. See Goff et al., *supra* note 92, at 301–05. In one study, Goff and his colleagues had participants watch a video of police officers beating a black suspect. *Id.* at 302. Video participants had previously been primed with either words relating to apes or big cats. *Id.* at 301–02. Participants primed with the ape words were more likely to report that the police beating was “deserved” and “justified” than those participants primed with the big cat words. *Id.*

could perform a coding analysis on actual closing arguments made by prosecutors, counting references to animal imagery, and could then seek to test those prosecutors using an implicit bias measure such as the IAT. If such a participant group could be located and tested (of course, without knowing the exact purpose of the study), it might be possible to measure whether implicit bias levels predict prosecutors' use of animal imagery in closing arguments. We believe studies such as these would help to pinpoint the exact locations where implicit bias is most likely to infect prosecutorial decision-making.<sup>112</sup>

We also encourage researchers and policymakers to consider remedial possibilities for the problem of implicit racial bias in prosecutorial discretion. The most obvious remedies, unfortunately, are the least likely to succeed. For instance, raising claims that prosecutors are selectively prosecuting black defendants is not a promising avenue. We know of no defendant who has obtained relief on these grounds in the modern era,<sup>113</sup> primarily because the U.S. Supreme Court has ruled that a defendant must demonstrate that similarly situated suspects of other races were not subjected to prosecution in order to even gain discovery on such a claim.<sup>114</sup> Nor are Fourteenth Amendment Due Process or Eighth Amendment Cruel and Unusual Punishment claims destined to succeed. In *McCleskey v. Kemp*, the Court rejected a capital defendant's statistical offering that racial arbitrariness infected Georgia's capital sentencing process and ruled that a defendant must show that racial bias infected *his* case before he might prevail on Eighth or Fourteenth Amendment grounds.<sup>115</sup>

Nor do we believe that implicit racial biases are subject to easy eradication. The associations that are triggered when people view a person of a particular race are likely the product of extensive cultural and social learning.<sup>116</sup> Some portion of our social learning is misinformed (e.g., "Black citizens are more hostile than white citizens."). Some por-

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112. Of course, these suggestions are only a few examples of a range of possible studies.

113. See Bibas, *supra* note 44, at 970 (noting in this context that "[n]o race-based claim has succeeded for more than a century").

114. *United States v. Armstrong*, 517 U.S. 456, 458 (1996).

115. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

116. Researchers have considered various social-learning-related factors that lead to implicit biases. See, e.g., Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 79, 79–81 (2004) (indicating that both early life experiences and culturally held biases, as well as other factors, lead to implicit biases). Stereotypes more generally have been shown to be learned by extremely young children. See Page, *supra* note 99, at 203 (claiming to find that stereotypes arise when a person is as young as three years old and are usually learned from parents, peers, and the media); see also Frances E. Aboud & Maria Amato, *Developmental and Socialization Influences on Intergroup Bias*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES 65, 73–76 (Rupert Brown & Samuel L. Gaertner eds., 2001).

tion, however, is perhaps accurate, though built on the foundations of structural inequality. Consider the stereotype that black citizens have less respect for law enforcement or trust in the judicial system. These stereotypes accurately reflect most polling data and also reflect underlying realities about police-citizen relations in minority-concentrated urban areas.<sup>117</sup> In order to undo this cultural and social learning, we would need to see fundamental changes in the political, economic, and social structures that undergird our country.<sup>118</sup>

But there are some promising shorter-term remedial avenues. Stephanos Bibas suggests that prosecution offices might collect and store comprehensive information on racial demographics at each stage of the charging process. The collected data would be made available internally and to a variety of external stakeholders, which would both allow for the review of “systemic patterns” and “create feedback loops and new metrics for prosecutorial success.”<sup>119</sup> Prosecutors’ offices might also provide live or video trainings on implicit bias to attorneys and paralegals and could also include thoughtful discussions and explanations of implicit racial bias in training manuals that address each of the decision points where implicit racial bias is likely to infect the process. Although there is no guarantee that live or written trainings would necessarily reduce bias, those who are egalitarian-minded could use these explicit reminders to self-monitor.<sup>120</sup>

Category-masking, the process of hiding racial demographic data until after the relevant decision is made, also holds some potential as a structural change that could reduce the effects of implicit bias. This process has previously been proposed as a possible remedy for race-based

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117. See, e.g., U.S. DEP’T OF JUSTICE: CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT xix (2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf) (“[C]ommunity members, especially members of racial, ethnic, and language minorities . . . expressed to us their deep distrust of and sense of alienation from the police.”); Smith & Sarma, *supra* note 103, at 391 (“Part of the discrepancy stems from first-hand encounters with law enforcement that the black citizen interpreted to be racist, either explicitly (e.g., use of terms with racial meaning, such as ‘nigger’ or ‘boy’) or vicariously (e.g., being stopped for ‘driving while black.’)” (citation omitted)).

118. See Levinson, *Forgotten Racial Equality*, *supra* note 3, at 420 (noting that short-term remedies for implicit bias should not obscure the need for long-term cultural change).

119. *Id.*

120. This suggestion is analytically similar to the use of an implicit bias jury instruction for criminal trials. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 149–51 (2010) (suggesting the use of implicit bias jury instructions and revealing that—as a federal district court judge—“I now include a slide about implicit bias in the PowerPoint presentation that I show before allowing attorneys to question potential jurors”).

jury selection.<sup>121</sup> In the jury selection context, litigants would exercise a first round of peremptory strikes based on answers to juror questionnaires that were scrubbed for demographic data.

A similar effort undergirds the decision to proceed under the federal death penalty statute—when the prosecutor receives the case file they are (theoretically)<sup>122</sup> unaware of the race of either the victim or the defendant. Broadening this type of remedial effort beyond the situations of jury questionnaires and capital cases, one could imagine a process inside a district attorney's office whereby a case intake coordinator masks all demographic information on a computerized case file (including the defendant's name and mug shot) until after the assistant district attorney handling the case has made a nonbinding charging decision (and preliminary plea bargain eligibility assessment).<sup>123</sup> In addition, when office-wide data show significant disparities in charging or plea bargains in relation to a particular offense, any charging or bargaining decisions in those types of cases could be reviewed by a more senior prosecutor or a committee of prosecutors (with demographic data masked) regardless of the races involved. This process could continue until the office-wide data demonstrate that the disparity has been eliminated (or proven to be accounted for by legitimate nonracial variables).

Finally, we believe the hiring and promotion of a more diverse pool of assistant district attorneys might curb the operation of implicit racial bias and might even improve the quality of decision-making on an office-wide level. Research in the jury context, for example, has shown that diverse group decision-making is better than homogenous group decision-making.<sup>124</sup> Furthermore, research in other areas, such as the education arena, has found that students exposed to counter-stereotypical role models—for example, women engineering professors—actually harbored

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121. See, e.g., Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 535 (2008) ("Research on orchestras, for example, demonstrates that female musicians are more likely to be hired when they audition behind a screen, effectively concealing their gender." (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000))).

122. In reality, racial background is often easily predicted from other characteristics such as the name of the defendant or victim or the neighborhood where each resides. A truly colorblind process would exclude as much demographic data as possible without restricting the necessary case facts that the decision-maker must take into account.

123. Of course, true masking would require masking neighborhood demographics and even the names of the defendant and the victim, as these factors could easily "tip off" the prosecutor as to the racial background of the parties involved.

124. See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 597 (2006) (comparing all white juries to mixed juries, and finding that mixed juries performed better).

reduced implicit bias.<sup>125</sup> Based on these studies and others, we would expect that a diverse prosecutor's office might not only facilitate an atmosphere with less implicit bias but could perhaps also lead to even more thoughtful and efficient decision-making. A related proposal that is both more aggressive and also more targeted to prosecutorial discretion would be to help assistant district attorneys better understand the minority group population that they serve (both the victims and the defendants) by encouraging these lawyers (perhaps with housing or tax incentives) to live in neighborhoods disproportionately impacted by the charging decisions made by the district attorney's office.<sup>126</sup>

Each of the potential remedies we discuss above would benefit from empirical testing, yet we do not believe, considering the likely ongoing harms, that waiting for a perfect scientific answer to the debiasing question is the best response. It is true that there are no easy answers for remedying the influence of implicit racial bias on prosecutorial discretion. Yet, justice should not wait, and the search for fairness in the criminal justice system must continue with both a moral compass and a thirst for emerging social-scientific knowledge.

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125. Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 642–45 (2004).

126. Of course, as one of the student editors who reviewed this piece noted, "Another suggestion is to lessen the workload of prosecutors so that they have more time to fully analyze and develop the facts of each case. Presumably, with more information and time spent analyzing what is going on, prosecutors will be more informed and rely less on their snap judgments or gut feelings."